

1-1974

Klopping v. City of Whittier: Improving the Valuation Process for Inverse Condemnation

Stewart H. Foreman

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Stewart H. Foreman, *Klopping v. City of Whittier: Improving the Valuation Process for Inverse Condemnation*, 25 HASTINGS L.J. 768 (1974).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol25/iss3/12

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

KLOPPING v. CITY OF WHITTIER: IMPROVING THE VALUATION PROCESS FOR INVERSE CONDEMNATION

The social principle underlying condemnation law is that a private property owner's losses should be distributed among the taxpaying public when the property is appropriated for public use.¹ The constitutional guarantee of just compensation for the public taking of private property is insured by two procedures: eminent domain and inverse condemnation. The best known of the two is eminent domain, also called direct condemnation, permitting a condemnor to take private property for public use. This note focuses on inverse condemnation, which allows an owner to sue for the fair market value of property which allegedly has been appropriated for public use. *Klopping v. City of Whittier*² specifically addresses the question of proper valuation for the property to reflect losses occurring prior to the date of actual taking.

The state and federal constitutions guarantee just compensation in inverse condemnation cases as for eminent domain.³ Likewise the substantive valuation rules apply equally in either case. In general, just compensation is measured by the fair market value of the property at the time of the taking.⁴ Market value is defined as "the

1. U.S. CONST. amends. V, XIV; CAL. CONST. art. 1, § 14; see *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942); VAN ALSTYNE, *Inverse Condemnation Goals and Policy Criteria*, in CAL. LAW REVISION COMM'N, CALIFORNIA INVERSE CONDEMNATION LAW 75, 86, 99-101 (1971); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1168 (1967) [hereinafter cited as Michelman].

2. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). Inverse condemnation and eminent domain are on opposite sides of the same legal coin. See *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970); VAN ALSTYNE, *Scope of Legislative Power*, in CAL. LAW REVISION COMM'N, CALIFORNIA INVERSE CONDEMNATION LAW 15, 18 & n.16 (1971). See generally Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3.

3. See generally 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 223, at 2033 (7th ed. 1960). The relationship and demarcation between compensable takings and police power actions for which no compensation is required lies beyond the scope of this Note. See generally Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 62; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

4. *Rose v. State*, 19 Cal. 2d 713, 737, 123 P.2d 505, 519 (1942). "Taking" can

highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable."⁵

Since market value constantly fluctuates, the courts must fix a date from which to measure fair market value, thus ignoring prior and subsequent changes in the value. Ideally, the date of valuation will coincide with the date on which the condemnor is determined to have acquired ownership of the property.⁶ However, a variety of circumstances may occur prior to that date which will artificially depress the value of the property.⁷ In these cases a different valuation date must be used so as to assure the owner full compensation for the land.⁸ In recent times, acts which most commonly cause an artificial depreciation in market value arise from massive urban renewal projects. In various urban areas in the United States, the initiation of renewal is characterized by the condemnor creating a wasteland in the inner city area because of scattered demolition and discontinuance of city services. The businesses and landowners remaining in the area after the first series of eminent domain suits lose customers, tenants, and profits; of course, the market value of their properties plummets as a result.⁹

occur in a number of ways but in the usual case it is the result of issuance of a condemnation summons. CAL. CODE CIV. PROC. § 1249 (West 1972).

5. *Sacramento S.R.R. Co. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979, 980 (1909).

6. CAL. CODE CIV. PROC. § 1249 (West 1972). In California the statutory valuation date for eminent domain is the date of issuance of the condemnation summons.

7. The situation has been characterized as placing the landowners under "a sword of Damocles". 4 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 12-3151, at 12-293 (rev. 3d ed. 1971) [hereinafter cited as NICHOLS]; see Kanner, *Condemnation Blight: Just How Just is Just Condemnation?*, 48 NOTRE DAME LAW. 765 (1973).

8. See *Danforth v. United States*, 308 U.S. 271 (1939); Sackman, *Condemnation Blight—A Problem in Compensability and Value*, 1973 SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 157, 166 (Southwestern Legal Foundation) [hereinafter cited as Sackman].

9. A typical condemnation case is one in which the time of appropriation is disputed. This situation contrasts the problem of "taking" from the problem of "just compensation." The fundamental question is when the ownership of the property transferred from the private owner to the public condemnor. The owner typically alleges that the taking occurred because of oppressive acts by the condemnor which have deprived the owner of the incidents of ownership. The argument is called a *de facto* taking theory. The California Supreme Court said the prevailing rule for *de facto* taking is stated in *City of Buffalo v. J.W. Clement Co.*, "that a *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property." *Klopping v. City of Whittier*, 8 Cal. 3d 39, 46 500 P.2d 1345, 1351, 104 Cal. Rptr. 1, 7 (1972), citing, 28 N.Y. 2d 241, 255, 269

The valuation process requires a twofold analysis. First, it is necessary to determine whether the market value of the property has appreciated or declined during the precondemnation period.¹⁰ Secondly, one must determine if during the precondemnation period the parcel was definitely designated for eminent domain or merely within the undesignated boundaries of a general condemnation zone.¹¹

All condemnation valuation cases can be placed in one of the four categories derived from this analysis. The first case, called *enhancement*, is one in which an undesignated¹² parcel increases in value during the precondemnation period. In the event that the parcel eventually is designated for condemnation, California allows the owner to benefit from the increased value by including the appreciation in the amount of just compensation.¹³ The second situation is the converse of the first, and is called *condemnation blight*.¹⁴ In this situation,

N.E.2d 895, 903, 321 N.Y.S.2d 345, 357 (1971). See generally Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973); 72 COLUM. L. REV. 772 (1972). If the condemnee proves a taking, then just compensation is valued from the date of *de facto* taking. As a result, all of the decline in market value of the property since the *de facto* taking date, including, for example, losses from a natural disaster, is part of the compensation owed by the condemnor. The condemnee would also receive interest on that amount of money since the time the compensation was payable and reimbursement for the costs of maintaining the property since the taking. See Comment, *Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings—Is Inverse Condemnation The Answer?*, 3 PAC. L.J. 571, 586-87 (1972).

10. When a desirable project such as a public recreation area is planned, enhancement of property values can occur before condemnation plans are completed because of land speculation over which property will be condemned and which land will lie on the boundaries of the project. On the other hand, general property values will decline when the condemnation plans call for an undesirable project such as a garbage dump. The unfortunate owners whose property is not condemned for the project and who now border the new garbage dump will receive no compensation for their severe devaluation losses. Their hope for recovery is that activity by the condemnor will be of such a magnitude as to establish an inverse condemnation action.

11. Some commentators and cases do not distinguish between the designated parcel and undesignated parcel situation. This leads to a classification system which only distinguishes on the basis of *de facto* taking and condemnation blight. *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 209 N.E.2d 895, 321 N.Y.S.2d 345 (1971); See Sackman, *supra* note 8; cf. Matteoni, *Just Compensation*, CONDEMNATION PRACTICE IN CALIFORNIA 44 (Cal. Cont. Ed. Bar 1973).

12. "Undesignated" here is used in a technical sense meaning land which is in a general zone scheduled for condemnation but which itself is not specifically identified for condemnation. In fact, it is not certain at that time whether the land will eventually be condemned.

13. *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal. 3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

14. *Klopping v. City of Whittier*, 8 Cal. 3d 39, 45, 500 P.2d 1345, 1350, 104 Cal. Rptr. 1, 6 (1972); *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal. 3d 478, 483 n.1, 483 P.2d 1, 3 n.1, 93 Cal. Rptr. 833, 835 n.1 (1971). Condemnation blight occurs when there are acts by the condemnor which depress land value prior to eminent do-

property values in a general area decline because an unappealing project is proposed for the area. As of yet, California has not determined which party should bear such losses.¹⁵ The third case is extremely rare since it occurs when the value of the parcel increases even though it is designated for condemnation.¹⁶

The fourth situation is the type that was found in *Klopping*; there is a decrease in the value of a designated parcel as a result of public knowledge of the imminent condemnation. In order to assure just compensation, a valuation date must be chosen which antedates public awareness of the imminent condemnation. The measure of compensation has not previously been interpreted to include the economic losses suffered by a condemnee aside from decline in market value accruing during a long precondemnation period. Examples of such economic losses would include loss of rental income, lost profits, loss of goodwill, and moving expenses.¹⁷

Taking these factors into consideration, the narrow legal issues in *Klopping* were: (1) when property is definitely designated for future condemnation, may a condemnee sue in inverse condemnation for damages which are reflected in a decline in market value, and, (2) aside from a recovery based on market value, must economic losses be indemnified as part of just compensation.

Klopping v. City of Whittier

*Klopping v. City of Whittier*¹⁸ involved a city's plan to take the condemnee's property as part of a new parking district. The city

main. By establishing an earlier valuation date, the theory of blight permits a realistic valuation of the condemned property. *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 255, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 357 (1971). This general approach to blight is qualified in *Klopping* to apply only to the situation in which the blighted parcel is not definitely designated for condemnation. 8 Cal. 3d at 45, 500 P.2d at 1350, 104 Cal. Rptr. at 6.

15. *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal. 3d 478, 483 n.1, 483 P.2d 1, 3 n.1, 93 Cal. Rptr. 833, 835 n.1 (1971); see Comment, *Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings—Is Inverse Condemnation the Answer?*, 3 PAC. L.J. 571, 573, 577-78 (1972).

16. See, e.g., *United States v. Miller*, 317 U.S. 369 (1943); *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 P. 372 (1888).

17. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (compensation for pre-emption of trade routes); *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So. 2d 289, 291-92 (Fla. 1958) (recovery for moving expenses); see *Housing Authority v. Savannah Iron & Wire Works, Inc.*, 91 Ga. App. 881, 87 S.E.2d 671 (1955); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

18. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). There was other litigation which stymied this project. *City of Whittier v. Aramian*, 264 Cal. App. 2d 683, 70 Cal. Rptr. 805 (1968); *Alpha Beta Acme Mkts, Inc. v. City of Whittier*, 262 Cal. App. 2d 16, 68 Cal. Rptr. 327 (1968).

council's resolution of intent to condemn the owners' properties was followed by a three year delay before an eminent domain action was instituted. In the interim, the condemnees filed claims with the city for their losses reflected by a decline in the value of their parcels and by losses of anticipated rental income. When the claims were denied, the condemnees sued in inverse condemnation asserting that this was a proper form of action to recover losses for a taking of property without just compensation.¹⁹ The city argued that there had been no physical invasion or direct interference with the parcels so as to deprive the condemnees of ownership during the precondemnation period.²⁰

The court's holding in this case was twofold. First, the court said that just compensation includes some precondemnation losses because property rights must be completely protected. In attempting to find a balance between encouraging public projects and protecting the oppressed owner, the court resolved the conflict by indemnifying only those precondemnation losses caused by the *unreasonable* activity of the condemnor.²¹ More precisely, the court held that to effectuate this principle the condemnee must be given the opportunity to demonstrate that:

- (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value.²²

When determining the amount of compensation, the implementation of this holding requires a trier of fact to disregard the decline in market value caused by the activity of the condemnor.²³ The jury evidentially must make the determination from evidence of a higher market value prior to the condemnor's activity so as to identify and discount the subsequent depreciation effectively.

Secondly, the *Klopping* court held that loss of anticipated rental income should be a factor included in the fair market value appraisal

19. Whereas *Klopping* had been a party to the final eminent domain proceeding on his property, Sarff was no longer the real party in interest with respect to his land. The court therefore allowed Sarff to recover his losses incurred while he owned his property, but *Klopping* was barred by *res judicata*. The court said, "[*Klopping*] is barred from seeking those damages in inverse condemnation once the condemnation proceeding becomes final." 8 Cal. 3d at 58, 500 P.2d at 1360, 104 Cal. Rptr. at 16, citing *Domestic & Foreign Petroleum Co., Ltd. v. Long*, 4 Cal. 2d 547, 562, 51 P.2d 73, 80 (1935); 4 B. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 166 (2d ed. 1971); 1 CAL. JUR. 2d, *Actions* § 75-79 (splitting causes of action).

20. 8 Cal. 3d at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7.

21. *Id.* at 51-52, 500 P.2d at 1354-55, 104 Cal. Rptr. at 10-11.

22. *Id.* at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.

23. *Id.* at 53, 500 P.2d at 1356, 104 Cal. Rptr. at 12.

used to determine the amount of just compensation. Therefore, as a result of this holding the condemnee must now be indemnified for the loss of rental income attributable to precondemnation occurrences.²⁴

Effect of Klopping on California Condemnation Law

California's Resolution of the Valuation Problem

The first case in California establishing standards for the valuation of condemned property is *San Diego Land & Town Co. v. Neale*.²⁵ In *Neale* the condemnee claimed that the value of his property had appreciated as a result of the condemnor's special need for the property to complete the project. The condemnee thus was claiming compensation which included the inflated value caused only by the condemnor's special need for it. In determining the valuation formula to guide the jury, the court held that the inflated value of the land which arises from the condemnor's special need for that particular parcel must be excluded from the compensation award.²⁶

Nearly fifty years later, the case of *Atchison, Topeka and Santa Fe Railroad Co. v. Southern Pacific Co.*²⁷ presented the issue of whether a condemnee should be compensated for the decline of the market value caused by a six year precondemnation period. The court looked to *Neale's* exclusion of inflated value as precedent, and without distinguishing the cases denied the condemnee compensation for the loss in value.²⁸ The *Atchison* decision is contrary to the basic condemnation principle that all taxpayers should share the condemnee's burden in financing projects. *Atchison* served to encourage condemnors to shift a portion of the project's cost onto the owners by driving down market values prior to condemnation.²⁹

Prior to *Klopping*, an alternative rule developed in *Buena Park School District of Orange v. Metrim Corp.* and *People ex rel. Dept. of Public Works v. Lillard*.³⁰ Taken together, *Buena Park School District* and *Lillard* embody the better rule by requiring the jury to

24. *Id.* "Rental losses occasioned by a general decline in the property value or by a natural disaster occurring prior to the date of taking must, however, be borne by the property owner."

25. 78 Cal. 63, 20 P. 372 (1888).

26. *Id.*

27. 13 Cal. App. 2d 505, 57 P.2d 575 (1936).

28. *Id.* at 518, 57 P.2d at 581.

29. *Klopping* overruled *Atchison* and subsequent cases which relied on it. 8 Cal. 3d at 49-50, 500 P.2d at 1353, 104 Cal. Rptr. at 9.

30. *People ex rel. Dep't of Pub. Works v. Lillard*, 219 Cal. App. 2d 368, 33 Cal. Rptr. 189 (1963); *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959). *Buena Park School Dist.* and *Lillard* are discussed extensively in *Klopping*. 8 Cal. 3d at 50-51, 500 P.2d at 1353-54, 104 Cal. Rptr. at 9-10. See generally Andersen, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, 5 SANTA CLARA LAW. 35 (1965).

disregard the decline in market value after the condemnor takes steps towards acquisition of the parcel.

In *Buena Park School District* the condemnee had made considerable progress towards a completed subdivision of land for residential housing. The condemnor initiated eminent domain proceedings to acquire acreage for a school. The condemnee sought to have compensation based on what a purchaser would have paid for the partial subdivision without knowledge of the condemnation. In opposition, the condemnor contended that the property should be valued as unimproved land since it was no longer marketable as a subdivision. The court held that the valuation time was not after the condemnation begins because at that time the property is "not actually saleable."³¹ Rather, the court stated:

It follows, therefore, that in arriving at the fair market value it is necessary that the jury should disregard not only the fact of the filing of the case but should also disregard the effect of steps taken by the condemning authority toward that acquisition. To hold otherwise would permit a public body to depress the market value of the property for the purpose of acquiring it at less than market value.³²

The effect of *Buena Park School District* was to allow the jury to compensate based on what a willing purchaser would pay a willing seller in an open market situation. Only through this standard is the condemnee assured of full just compensation.

Following *Buena Park School District*, *Lillard* indicated that an expert witness may be questioned on the depreciating effect of a threatened condemnation action. Furthermore, *Lillard* said that the jury should be instructed to disregard the preliminary action of the condemnor and the resulting effect on market value.³³ Finally, *Buena Park School District* and *Lillard* required the condemnor to have taken specific steps toward acquisition before the valuation rules were appli-

31. 176 Cal. App. 2d at 258-59, 1 Cal. Rptr. at 252-53. *Klopping's* approval of this rule affirms California's alignment with the federal rule that the Fifth Amendment requires exclusion of any depreciation in value caused by the prospective taking once the government is committed to the project. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961); *United States v. Cors*, 337 U.S. 325 (1949) (appreciation in value); *United States v. Miller*, 317 U.S. 369, 376-77 (1943) (appreciation in value).

32. 176 Cal. App. 2d at 259, 1 Cal. Rptr. at 253.

33. *Lillard* arises from a technical evidentiary problem during the trial. During the cross-examination of the condemnor's valuation expert, the condemnee inquired about a ten year threat of condemnation in the area and the resulting depressed market value of the parcel. Since there had been no evidence of the precondemnation situation nor proper foundation for the question, the trial court sustained the condemnor's objections. On appeal, the trial court was affirmed for its correct ruling in that situation, but the court also approved of the rule in *Buena Park School Dist.*, 219 Cal. App. 2d at 377, 33 Cal. Rptr. at 194.

cable. The rules produce compensation which is commensurate with the property value existing prior to the condemnor's preliminary action.³⁴ In *Klopping* the specific step toward acquisition was the unreasonable precondemnation announcement. However, *Klopping* should not be confined to its facts because all hostile precondemnation conduct has the potential of depreciating market values. *Klopping* takes a dramatic step beyond these cases by holding that any oppressive conduct during a precondemnation period can be interpreted as a step toward acquisition causing compensable damages.

Klopping gives little indication of the type of oppressive conduct which would call for an application of its valuation rules. The court stated that "activities which give rise to such damages may be significantly less than those which constitute a de facto taking of property so as to measure the fair market value as of a date earlier than that set statutorily by Code of Civil Procedure section 1249."³⁵ Some examples of activities which have constituted a de facto taking are: filing of *lis pendens*, denial of access, denial of city services in the condemnation zone, notices to tenants and owners to vacate, forced demolition, denial of building permits, and unreasonable maintenance of zoning restrictions.³⁶ Since the *Klopping* view of de facto taking requires a physical invasion or *direct legal restraint* by the condemnor,³⁷ these examples can be categorized as *direct restraints* on the use of land prior to condemnation. Whatever actions would be in the class of activities which would be less than a direct restraint can be conveniently labelled *indirect restraints*.

Typical examples of this kind of activity can be drawn from states which have liberal views of de facto taking encompassing *indirect restraints*. In those states indirect restraints are defined as abuses of the power of eminent domain.³⁸ Rather than relying exclusively on the willful or intentional acts of the condemnor, these states recognize the necessity of compensating in some situations for

34. 219 Cal. App. 2d at 377, 33 Cal. Rptr. at 194; 176 Cal. App. 2d at 259, 1 Cal. Rptr. at 253. *Klopping* correctly chose this line of cases which parallels the statutory rules for negotiated sales in guaranteeing full valuation to the condemnee. 8 Cal. 3d at 51 n.3, 500 P.2d at 1354 n.3, 104 Cal. Rptr. at 10 n.3; see CAL. GOV'T CODE § 7267.2 (West Supp. 1973); Andersen, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, 5 SANTA CLARA LAW. 35, 46-47 (1965).

35. 8 Cal. 3d at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.

36. See generally *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd but modified*, 405 F.2d 138 (6th Cir. 1968); *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *In re Elmwood Park Project*, 376 Mich. 311, 136 N.W.2d 896 (1965).

37. 8 Cal. 3d at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7.

38. *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967).

damage resulting merely from the natural and probable consequences of the condemnor's actions.³⁹ The adoption of a similar approach would allow the court to evaluate the separate and cumulative impact of these acts on the market value prior to condemnation.

As a result of *Klopping*, even if the owner cannot prove *direct restraints* amounting to a de facto taking, the owner can rely on the valuation rule to prove the damaging impact of *indirect restraints* on the property's market value. Thus the condemnee can avert an unjust reduction of compensation. *Indirect restraints* need not be defined with any greater precision. Whether or not activity comes within these definitions should be controlled by careful evaluation of the recognized purpose of just compensation.⁴⁰

An important practical consideration for condemnee suing under *Klopping* is that he must establish the applicability of the valuation rule. The condemnee has the burden of proving a decline in market value proximately caused by the unreasonable activity of the condemnor. Losses attributable to general conditions unrelated to the condemnor's activities are not compensable.⁴¹

Ambiguities in *Klopping's* Valuation Rule

Klopping's rule for disregarding depreciation in market value is ambiguous in two respects. First, as a factual matter, the court is unclear as to what kind of precondemnation announcement will permit a *Klopping* type analysis for compensation. In *Klopping*, the announcement was a formal city council resolution referring specifically to the plaintiffs' parcels. There are other types of announcements which similarly threaten to deny a condemnee just compensation and should trigger the valuation rules enunciated in *Klopping*.

Precondemnation announcements may be classified on a scale ranging from a formal specific city council resolution to a mere inter-agency memorandum or a newspaper report. *Klopping* uses examples of precondemnation announcements from earlier California cases to demonstrate when the new valuation rule should apply. These examples are important markers on this scale of precondemnation

39. *City of Cleveland v. Hurwitz*, 19 Ohio Misc. 184, 47 Ohio Op. 2d 384, 249 N.E.2d 562 (1969).

40. *Cf. United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). Moreover, for practical purposes a narrower reading of *Klopping* would render its rule mere surplusage in light of the new statutory cause of action for inverse condemnation. *See* CAL. CODE CIV. PROC. § 1243.1 (West 1972). This section affords an action for inverse condemnation when a condemnor resolves to acquire a parcel and does not thereafter initiate condemnation proceedings within six months. *See generally* Comment, *Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings—Is Inverse Condemnation the Answer?*, 3 PAC. L.J. 571 (1972).

41. 8 Cal. 3d at 47, 500 P.2d at 1351, 104 Cal. Rptr. at 7.

announcements. *Klopping* mentions two situations where the statement of intent to condemn would have been sufficient to require use of the valuation rules: (1) when the announcement of intent to condemn was made by a deputy county counsel at a probate sale of the subject property,⁴² (2) when an owner forbore from development of his property in reliance on a statement by the condemnor of intent to condemn.⁴³ In contrast, the California Supreme Court in *Selby Realty Co. v. City of San Buenaventura*⁴⁴ recently implied that merely identifying private property for future public use on a city's master plan was not a sufficient announcement of intent to condemn.

One is not confined to *Klopping* for examples of announcements. The myriad of precondemnation planning cases offers many useful examples of precondemnation announcements which could trigger the valuation rules.⁴⁵ For example, an agent of the condemnor might hold a formal meeting with members of the business community to disclose and discuss the improvement plan.⁴⁶ Similarly, dissemination of this type of information can occur at informal gatherings of interested citizens. If the market values of the prospective condemnees subsequently decline, they should rely on *Klopping*. Of course a tenant can also be a condemnee entitled to protection under the valuation rules. Therefore, when the condemnor's announcement forces a termination of the tenancy in a fashion which decreases the amount of compensation,⁴⁷ the valuation rule would apply. Finally, the mere plotting of a city improvement on the city map coupled with an un-

42. *Bank of America v. County of Los Angeles*, 270 Cal. App. 2d 165, 75 Cal. Rptr. 444 (1969). In *Bank of America* plaintiff presented a novel theory for recovery based on interference with its right to sell its property because of an announcement of future condemnation. *Klopping* limited its disapproval of *Bank of America* to the extent that it held that recovery for losses occasioned by an announcement of intent to condemn was prohibited. 8 Cal. 3d at 52 n.5, 500 P.2d at 1355 n.5, 104 Cal. Rptr. at 11 n.5. In *Bank of America* the appellant tried to prove a diminution of market value with evidence that if bidding on its property had taken place as planned, the bids would have been higher than the price received from the condemnor. *Klopping* requires a similar proof of diminution of market value. The theory of proof proffered in *Bank of America* may be useful in modern litigation under *Klopping*. The retraction of a bona fide offer which is higher than anything offered by the condemnor or others is excellent proof of the decline of market value since the announcement of future condemnation.

43. 8 Cal. 3d at 52-53 n.5, 500 P.2d at 1356 n.5, 104 Cal. Rptr. at 12 n.5; cf. *Hilltop Properties v. State*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965).

44. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

45. See generally Annot., 37 A.L.R.3d 127 (1971).

46. *Bakken v. State*, 142 Mont. 166, 382 P.2d 550 (1963). This pre-*Klopping* decision denied the plaintiff relief by adopting the then California law that recovery would be denied absent a de facto taking. *Id.* at 169-70, 382 P.2d at 552.

47. See *Concrete Serv. Co. v. State ex rel. Dep't of Pub. Works*, 274 Cal. App. 2d 142, 78 Cal. Rptr. 923 (1969).

equivocal act evidencing an intent to condemn would be sufficient to create compensable damages.⁴⁸ Presumably the announcement must be formal and, at least, made by a public official with apparent authority to make such a statement. Furthermore, though the situations may vary, the announcement must create the impression in the minds of the condemnee and potential purchasers that the specific parcel is definitely slated for future eminent domain.

The second ambiguity in *Klopping* is whether a precondemnation announcement is a condition precedent to an application of the valuation rule. In other words, is *Klopping* merely one factual situation in a broader category of unreasonable precondemnation activities which affect beneficial use and enjoyment of property and whose effects must be disregarded in the valuation process? On one hand, the court indicates that the precondemnation statement is an essential element.⁴⁹ One must realize that by requiring an announcement as a condition precedent, the *Klopping* valuation rule would only become operative when a subsequent condition taints the announcement, thereby creating an unreasonable injury to the condemnee. Therefore, this formulation requires both factors to bring a case within *Klopping*. The consequence of such an approach, however, is to allow the condemnor to make even a malicious announcement without fear of liability provided unreasonable conduct is subsequently avoided. Under this interpretation the subsequent condition is narrowly defined as either an excessive delay in eminent domain or as other oppressive conduct after an announcement.⁵⁰ This solution would lead to an unacceptable limitation on the use of the new valuation rule whose *raison d'être* is to avoid a denial of just compensation.

On the other hand, a better conclusion is derived from an examination of the effect of the court's holding on the use of the valuation rule.⁵¹ The court states that improper activity by the condemnor was *either* an unreasonable delay subsequent to an announcement of intent to condemn *or* "other unreasonable conduct prior to condemnation."⁵² This distinction between a conjunctive versus a disjunctive view of *Klopping* is subtle, but its consequences are important. By structuring the sentence in an *either/or* alternative, the court acknowledges that there are situations which would establish unreasonable precondemna-

48. *In re Philadelphia Parkway*, 250 Pa. 257, 95 A. 429 (1915); 8 Cal. 3d at 52 n.5, 500 P.2d at 1355 n.5, 104 Cal. Rptr. at 11 n.5; *Stafford v. People ex rel. Dep't of Pub. Works*, 144 Cal. App. 2d 79, 300 P.2d 231 (1956); *cf. Silva v. City & County of San Francisco*, 87 Cal. App. 2d 784, 198 P.2d 78 (1948).

49. 8 Cal. 3d at 51-52, 500 P.2d at 1354-55, 104 Cal. Rptr. at 10-11.

50. *Id.* at 51-52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.

51. *Id.*

52. *Id.*

tion conduct notwithstanding the absence of a precondemnation announcement. This approach would allow the use of the valuation rules on a case by case examination of the condemnor's conduct.

This interpretation reflects the supreme court's intent to guarantee just compensation in circumstances where it appears that a condemnor caused a depression in the market value with the effect of acquiring the property for less than market value.⁵³ The full intent of the *Klopping* court will be realized only by allowing a condemnee to prove that any unreasonable precondemnation conduct by the condemnor caused a diminution in market value which must be disregarded in the valuation process.

Noncompensable Incidental Losses

There are always losses occurring incidental to eminent domain, but because they are not directly caused by a taking or damaging of property, these losses do not come under the protective umbrella of the just compensation clause. *Klopping* retains the law that the condemnee must absorb incidental losses; however, the court assumes that such losses will be slight.⁵⁴ Incidental losses are narrowly defined in *Klopping* as those which occur when the condemnor announces an intent to acquire certain property and moves ahead by holding public hearings, pursuing legal channels, and satisfying the other obligations which arise from the institution of a public project. Apparently the court feels that a reasonable period between announcing the proposed improvement and the eminent domain action will encourage public participation in the decision whether the proposed project should be approved, changed, or abandoned, and therefore, is in the public interest and necessity.⁵⁵ Consequently, there may be some uncompensated rental loss, taxes, and minor depreciation in market value which are attributable to the risks of ownership.

In the context of *Klopping* where there was unreasonable precondemnation activity, the court said that it is a question of fact to determine the date for valuation of the property.⁵⁶ *Klopping* indicated that six months after an announcement of future condemnation, rights of an owner to use and enjoy property are probably so substantially interfered with as to present a strong argument for compensation.⁵⁷ In recognition of this inequity, the court devised concept of a reasonable

53. *Id.* at 51 & n.3, 500 P.2d at 1354 & n.3, 104 Cal. Rptr. at 10 & n.3.

54. 8 Cal. 3d at 51-52 & n.4, 500 P.2d at 1354-55 & n.4, 104 Cal. Rptr. at 10-11 & n.4.

55. *Id.* at 51, 500 P.2d at 1354, 104 Cal. Rptr. at 10.

56. *Id.* at 55, 500 P.2d at 1357, 104 Cal. Rptr. at 13.

57. *Id.* at 54-55, 500 P.2d at 1357, 104 Cal. Rptr. at 13.

precondemnation period assures fairness during eminent domain.⁵⁸ The jury has much discretion when confronted with a potentially unreasonable precondemnation period. If the losses accumulate so as to damage unreasonably one's incidents of ownership, then the jury may award compensation. If the losses do not cross this intangible and flexible border, they are merely incidental.⁵⁹ This formulation of incidental losses will prohibit the condemnor from producing "bargain" public improvements by unscrupulously driving down market values prior to condemnation and from equivocating on its final project plans.⁶⁰

Recovery of Loss of Rental Income

Condemnees often urge the courts to allow independent recovery for economic losses caused during precondemnation delay, such as loss of rental income. Although *Klopping* expands the concept of what can be included in fair market value, it does not support the proposition that purely economic losses are recoverable.⁶¹ *Klopping* retains

58. See generally Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973).

59. See Adams, *Eminent Domain, Police Power and Urban Renewal: Compensation for Interim Depreciation in Land Values*, 7 GA. L. REV. 226 (1973).

60. See CAL. CONST. art. 1, § 14 (West 1954). See generally Michelman, *supra* note 1. *Klopping* is commensurate with Professor Michelman's "fairness" test for distinguishing compensable and noncompensable situations. The traditional "diminution of value" test does not provide an adequate framework for reconciliation of the decisions in California. Consolidated Rock Prod. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); CAL. LAW REVISION COMM'N, *Inverse Condemnation Goals and Policy Criteria*, in CALIFORNIA INVERSE CONDEMNATION LAW 75, 90 (A. Van Alstyne). In accordance with the "fairness" test analysis, *Klopping* uncovers hidden project costs such as the costs of delay and abandonment that have been shifted to the condemnee. See Comment, *Delay, Abandonment of Condemnation, and Just Compensation*, 41 S. CAL. L. REV. 862 (1968). California's policy has long been to avoid forcing the owner to contribute more than his proper share to the public undertaking. See House v. Los Angeles Flood Control Dist., 25 Cal. 2d 384, 396-97, 153 P.2d 950, 956 (1944) (Traynor, J., concurring). *Klopping* expands this principle by moving towards Michelman's test which is grounded on determinations of fairness and social utility. This is in contrast to the diminution-in-value test, the balancing test, the noxious use test, or other tests discussed by commentators for evaluating whether compensation is required. Notwithstanding the caveat that the fairness test is not well suited for judicial use (Michelman, *supra* note 1, at 1248-53), *Klopping* creates some guideposts for assuring "fairness" and avoiding capriciousness. For example, *Klopping* emphatically requires a reasonable period for public discussion of the proposed project. Losses accruing to the owner during such a period are not recoverable because of the need for public participation in developing the project. Once the period extends to an unreasonable length, *Klopping* allows the condemnee to sue for recovery of losses by proving that spoliation and cost-shifting have occurred. Compare *id.* at 1180-81.

61. See generally Kanner, *When is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. WEST. L. REV. 57 (1969).

fair market value as the underpinning of the just compensation clause, but recognizes that rental income is a useful way of determining market value under some circumstances.

The circumstance presented in *Klopping* was that the loss of fair market value was best evidenced by the loss of rental income during the precondemnation period. The court accepted "that rent is an appropriate criterion for measuring fair market value."⁶² Since there is a direct functional relationship between rental income and market value (that is, the increase and decrease in direct proportion to each other) evidence of losses of anticipated rental income is probative of a decline in market value. Therefore, loss of rental income calculated over the life of the property is a measure of the decline in market value. As such, market value is still the guide for recovering just compensation, but a modern formula for appraising market value includes the element of loss of rental income. This element is properly incorporated in the fair market value when the condemned property is of such a nature that a potential purchaser other than the condemnor would consider the value of anticipated rental income in determining the property's value.⁶³

For its holding the *Klopping* court relied on *Luber v. Milwaukee County*⁶⁴ which granted an award for rental loss for the period between the announcement and the time the suit was filed as part of the constitutional requirement of just compensation. The *Luber* analysis focused on identifying those property interests other than the ownership of *physical* property which are significant enough to be protected by just compensation.⁶⁵ *Luber* acknowledged that many states have rectified "the injustice of denying recovery for other than the fair market value of the physical property"⁶⁶ *Luber* also examined the possibility of interpreting the Wisconsin constitutional provisions to include compensation for some distinct economic losses.⁶⁷ However, *Luber* sustained the traditional theory that compensation is provided only for the value of appropriated property, and stated:

We think that under *property* concepts one's interest in rental income is such as to deserve compensation under the "just compen-

62. 8 Cal. 3d at 53, 500 P.2d at 1356, 104 Cal. Rptr. at 12; 4 NICHOLS, *supra* note 7, at §§ 12.3122, 12.42.

63. Buena Park School Dist. v. Metrim Corp., 176 Cal. App. 2d 255, 260, 1 Cal. Rptr. 250, 254 (1960). "The market value was the value of the property in the condition it was at the time of valuation, taking into consideration all of those things which a purchaser would properly consider."

64. 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

65. *Id.* at 279, 177 N.W.2d at 384.

66. *Id.* at 280, 177 N.W.2d at 385; see 2A NICHOLS, *supra* note 7, at § 6.44 *et seq.*

67. 47 Wis. 2d at 282-83, 177 N.W.2d at 386.

sation" provision of the Wisconsin Constitution.⁶⁸

In conclusion, *Klopping* parallels *Luber* to the extent that they both find that loss of rental income is a component of fair market value and therefore is includable in the compensation award. *Klopping* did not allow an independent recovery for loss of rental income, separate from compensation for the fair market value of the parcel.⁶⁹ Arguably, a better policy may allow just compensation to include recovery for the market value of the appropriated property *plus* the multifarious economic losses suffered during the condemnation process. However, this view is precluded by the analysis of *Klopping* and *Luber*. Though California has not abandoned the idea that fair market value is the sole guide for just compensation, *Klopping* exemplifies how California courts will remain open to continuous modification and modernization of the fair market value formula.⁷⁰

Conclusion

Klopping v. City of Whittier extends the valuation rules previously established in California to ensure just compensation for the condemnee when precondemnation activity by a condemnor depreciates market values. In *Klopping*, the activity was a precondemnation announcement followed by a lengthy delay. However, the court held that other types of oppressive conduct which unreasonably inter-

68. *Id.* at 279, 177 N.W.2d at 384 (emphasis added), quoted in 8 Cal. 3d at 53, 500 P.2d at 1356, 104 Cal. Rptr. at 12.

69. See also 4A NICHOLS, *supra* note 7, at § 14.242.

70. The United States Supreme Court recently faced the same issue as the *Klopping* court of whether to enlarge the elements of fair market value to assure full compensation during condemnation. In *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), the Supreme Court held that the condemnee was entitled to compensation based on the fair market value for the leasehold, improvements, and all other elements and possibilities which would be considered in the open market, including the possibility of a renewed lease. The Court unequivocally reasoned that the value to be paid is based on what a willing buyer would pay in cash to a willing seller. The inclusion of potentials and possibilities is required since pragmatic purchasers do place value on such contingencies. See also *United States v. Fuller* 409 U.S. 488, 503-04 (Powell, J., dissenting) (1973). The government's position was to deny compensation for the value of the improvements beyond the remaining lease term, since these were mere potentialities which would be valueless once there was no possibility the lease would be renewed. The Court rejected this position because "[t]hat is not how the market would have valued such improvement; it is not what a private buyer would have paid Almota." 409 U.S. at 478.

The language and holding lead to the conclusion that compensation can be given for an expectant property interest. *Id.* at 477-78; cf. *id.* at 480 (dissenting opinion). This expansion of the concept of market value is explained by the fact that just compensation is based on principles of fairness as well as technical concepts of property law. *Id.* at 478. Therefore, just compensation should include elements for all the valuable characteristics of the property which a private party, without knowledge of impending condemnation, would appraise in offering a reasonable purchase price.

fere with the owner's use and enjoyment of the property will also activate the valuation rule. This rule simply requires the trier of fact to disregard any decline in market value caused by the precondemnation conduct. Since a precondemnation announcement is not a condition precedent, *Klopping* opens new avenues for condemnees to prove in eminent domain or inverse condemnation suits that the condemnor unreasonably depressed market values. *Klopping* is also mindful of the need for a reasonable precondemnation period in which the public can voice its opinion on the desirability and necessity of the proposed public improvement. Finally, *Klopping* liberalized the fair market value formula to include elements allowing for more fair and accurate approximations of just compensation.

Klopping will be important in guaranteeing full protection for constitutional rights during lengthy delays which generally preceed major public projects.⁷¹ This means that projects such as urban redevelopment, mass transportation, and preservation and creation of open space recreation areas can continue while most of the financial losses of displaced property owners will be indemnified. *Klopping* finds the delicate balance between encouraging careful, open planning of improvements and prohibiting condemnors from minimizing project costs by victimizing the condemnees.

Stewart H. Foreman*

71. See generally 72 COLUM. L. REV. 772 (1972). The writer highlights the devastating freeze that occurs on low-income homeowners' capital prior to eminent domain.

* Member, Third Year Class

Among all the publica-
tions designed to facilitate
legal research, you will
find nothing else quite like

SHEPARD'S CITATIONS

unique in concept and in
scope, it serves its tens of
thousands of users in ways
no other publication can.

SHEPARD'S CITATIONS

McGRAW-HILL, Inc.

COLORADO SPRINGS

COLORADO 80901

SERVING THE LEGAL PROFESSION FOR OVER A CENTURY